
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee

v.

JOHN HUDSPETH, ET AL.,

Appellees and Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR THE UNITED STATES AS
APPELLANT; ANSWER BRIEF FOR THE UNITED STATES AS APPELLEE

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AS APPELLANT

The Hudspeths' brief (hereinafter cited as H. Br.) fails almost completely to meet the contentions made in the Government's opening brief (cited as U.S. Br.). In addition, the Hudspeths' brief contains errors in its statement of the record.

We shall endeavor to deal, as summarily as possible, with the basic errors contained in that brief and with the specific matters in it which seems in most urgent need of correction.

I

THE HUDSPETHS' BRIEF DISREGARDS THE
RATIO DECIDENDI OF THE DISTRICT COURT

Throughout their brief the defendants have ignored the rationale of the district court as set forth in its findings of fact and conclusions of law (R. 12) and supplemental conclusion (R. 30). Many times in their brief the defendants have erroneously stated that the critical issue and the one upon which the court's decision was based was whether the dependent resurveys were accurate (H. Br. 2, 3, 9, 12-13, 14). This is not so. The court itself concluded (Tr. 175): "Now, I am not saying that the recent survey is in error, although there are many things about it that certainly might be subject to criticism." In fact, the district court decided the case on the basis of the issue of law stated in the pretrial order (R. 9-10): "Are defendants bound by plaintiff's resurvey?" The court held that they were "not bound by, or to be held liable for, the dependent re-surveys * * *" (Fdg. 3, R. 13).

Its reasoning was: (1) there were in fact timber trespasses by the defendants (Fdg. 3, R. 13); (2) the Government attempted to prove the original boundaries by dependent resurveys conducted after these trespasses had occurred; (3) dependent resurveys conducted after trespasses had occurred cannot be the basis of liability (Fdg. 3, R. 13; R. 30); (4) therefore the Government failed to meet its burden of proof: "the resurveys on which the plaintiff depends were made subsequent to the alleged trespasses" (R. 30; Fdg. 3, R. 13). This theory that the time of resurvey controls this case is emphasized by the supplemental opinion filed by the district court after the appeal was docketed (R. 30).

This reasoning is contradictory and wrong (G. Br. 19-32). The very essence of the dependent resurveys was to determine where the original boundaries are. Without relying upon the dependent resurveys there would be no way in which the court could have found that the defendants had trespassed (Fdg. 3, R. 13). The fact that the dependent resurveys were conducted after the trespasses had occurred has no effect upon the burden of proof, nor does it justify the trespasses. The case is still based upon the original

boundaries--the original boundaries are what is binding. The dependent resurveys simply reestablish what those boundaries have always been. They do not change or correct the original survey.

The defendants argue that the dependent resurveys alter the boundaries of their land (H. Br. 3, 9-12, 13). At no point in this case have they offered to show what those boundaries are. At most, they simply showed that they set their timber cutting line in a haphazard fashion (G. Br. 20-22; Tr. 145-148). The defendants entirely distort the record when they state that the Government's surveyor testified that their setting of the timber cutting line could have accurately established the original boundary (H. Br. 22). The Government surveyor's statement was qualified (R. 168): "Providing they found all original corners." By defendants' own admission, they never found any corners (R. 148). The effect of the dependent resurveys is to reestablish what the parties' rights in the lands have always been.

The arguments presented by defendants as to accuracy are really a request that this Court reconsider the facts

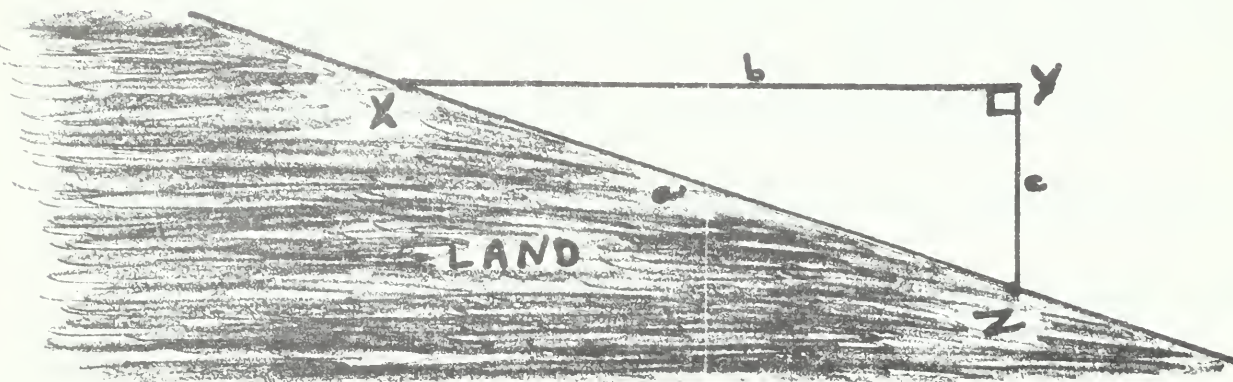
de novo since the district court considered and based its decision on the binding effect of the dependent resurveys and not upon their accuracy.

II

THE HUDSPETHS' BASIC MISCONCEPTION OF THE RECORD

A. The resurveys reconstructed and reestablished the lines of the original survey. - The very purpose of the dependent resurveys was to determine where, on the ground, the original boundaries were set (Ex. 6-8; Tr. 9-12, 27-28, 33, 64-65, 89-90). Defendants argue that the techniques used in making the resurveys in 1959 and 1962 and the measurements taken differ significantly from those of the original 1872 survey (H. Br. 15-22). First of all, the techniques of surveying have improved since 1872. But that makes no difference. The cadastral surveyor conducting a dependent resurvey must perform a bit of detective work to retrace the original surveyor's footsteps. He need not re-enact the 1872 survey with 1872 instruments. He must simply uncover on the ground the results of the original survey. Second, the references in the Hudspeths' brief to "discrepancies" between the measurements of the original survey and the dependent resurveys are meaningless (H. Br. 4, 15-22). Such argument amounts to a complete distortion of the record. The so-called "discrepancies" result from different units of measure being used in each of the surveys (R. 62-63, 26, 36-37).

The original surveys were performed in terms of slope measurements while the resurveys were performed in terms of horizontal measurements. Horizontal measurements will be numerically less than slope measurements though they describe the same boundary. This can be simply illustrated by the example.



For example, by the original survey the distance XZ would be given in terms of "a," i.e., slope. The resurveys would report the same distance, XZ, in terms of "b," i.e., horizontal. Thus, while the number of units in "a" differs from "b," each describes the same distance, XZ. ("a" will generally be greater than "b" since, according to the Pythagorean theorem of elementary geometry, $a^2 = b^2 + c^2$.) However, in conducting the resurveys, slope distances were used in searching for the original corners (Tr. 62-63).

Furthermore, it is a well-established principle that indications of a boundary on the ground control over those on paper. United States v. State Investment Co., 264 U.S. 206, 211-212 (1924); McIver's Lessee v. Walker, 13 U.S. (9 Cranch) 173, 177 (1815); Horne v. Smith, 159 U.S. 40 (1895); 1 Patton, Land, Titles (2d ed. 1957) sec. 149, pp. 390-396; 4 Tiffany, Real Property (3d ed. 1939) sec. 994, pp. 96-100. Field notes and plats are secondary evidence of what the surveyor actually did on the ground. Thus, even if the units of measure were the same, it would be meaningless to contrast a dependent resurvey based upon evidence of the original survey on the ground with the field notes and plats. Appellees' argument about "accuracy" is largely based on the notion that a survey like a mathematical formula can be "absolutely correct." Unfortunately, that is not so. Surveys are only relatively accurate, and the result is that in the many instances where the actual surveys do not on the ground follow the ideal grid of a township, so also the physical monuments do not necessarily jibe with the field notes and the plat. Restoration of lost corners by proportionate measurement is only resorted to when every other means of identifying the original positions has been exhausted.

B. The administrative nature of the resurveys was clearly before the court. - In the pretrial order, under "agreed facts," it was stated that the dependent resurveys were "accepted and approved by the Secretary of the Department of Interior * * *" (Nos. 6, 7, R. 8). In the findings of fact and conclusions of law, the district court itself stated that the dependent resurveys were accepted by the United States (Fdg. 3, R. 13). Floyd A. Brooks, who conducted the resurveys, was a cadastral surveyor with the Department of the Interior, Bureau of Land Management (Tr. 9). His instructions were from the United States Department of the Interior, Bureau of Land Management (Ex. 7, 8; Tr. 10-12). Irving Zirpel, Jr., testified that in Oregon and Washington he was Chief of the Branch of Cadastral Engineering, United States Department of the Interior, and that he reviewed and checked Brooks' work (Tr. 29, 86-87).

Furthermore the Manual of Surveying Instructions (Dept. of the Interior, 1947) was the standard for determining the accuracy of the dependent resurveys. The instructions, offered and received in evidence, for making the resurveys recited the fact that the Manual was the basic standard

(Ex. 7, 8). "In the execution of the retracements and resurveys * * * you * * * will be guided by the Manual of Surveying Instructions, 1947, the provisions of the following special instructions, and such supplemental instructions as may be issued pursuant to the report of complications developed during the progress of the work, or by reason of additional authorization." "Any and all original corners found in the course of your retracements will be rehabilitated by re-monumentation * * * as directed by Secs. 238 and 325 of the Manual." "You will extend your retracements to the boundary lines of adjacent sections in any cases where such action becomes necessary in the development of control for the restoration of any corner * * * setting iron corner monuments in conformity with Manual procedure." "Any and all lost corners of the sections for resurvey will be restored by the appropriate method of proportionate measurements which are described in detail, along with other pertinent matter, in Secs. 348 to 408, inclusive, of the Manual."

Thus, contrary to the defendants' allegation (H. Br. 3, 12-13, 15), the Manual has played a significant role in this case. Only by determining whether a resurvey was performed in accordance with the Manual can its accuracy be

determined. The resurvey reestablishes the original survey on the ground. There is nothing else on the ground with which to compare it. The original field notes and plats are secondary evidence. It is what the original surveyor did on the ground that controls. The resurveys here were made in conformity to the Manual; thus they were not arbitrary or capricious acts and should have been upheld.

The defendants characterize their attack on the administrative action as a so-called "defense". Where one attacks the validity of an administrative decision he must first exhaust his administrative remedies. No such showing was made. Defendants assert that the need to exhaust their administrative remedies is "inapplicable" (H. Br. 2, 6). They failed to make a direct attack upon the administrative decision and should have been barred from making a collateral attack. Poulos v. State of New Hampshire, 345 U.S. 395 (1952) (the remedy for denial of a license was by direct attack and not by violation of the decision and collateral attack when it was enforced); National Labor Relations Board v. Pappas & Co., 203 F.2d 569 (C.A. 9, 1953); Reconstruction Finance Corp. v. Lightsey, 185 F.2d 167 (C.A. 4, 1950);

United States v. Slobodkin, 48 F.Supp. 913, 917 (D. Mass. 1943). Defendants should have directly appealed to the Bureau of Land Management and then, if necessary, to the Secretary of the Interior (G. Br. 12-16). See, Best v. Humboldt Mining Co., 371 U.S. 334, 338-340 (1963).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be reversed and the case remanded to the district court with detailed instructions in accordance with the law. The effect of the defendants' argument is that the location of the boundaries can never be determined. They state (H. Br. 32): "The monuments and the land are no more capable of accurate resurvey today than they were when resurveyed twice previously." Such a conclusion is impossible. It is absurd to reach the legal result that because of the requirements of proof proposed by the court, which cannot be met, the court will require the title to a tract of land forever to be in limbo. Except for the guilt of trespass, appellees would be the first to complain of such a result of refusing to remove a cloud on their title.

ANSWER BRIEF FOR THE
UNITED STATES AS APPELLEE

For the purposes of this cross-appeal it must be assumed that the district court's findings of fact and conclusions of law and supplemental conclusion are correct. Then the question becomes: Whether it was within the district court's discretion to dismiss without prejudice the Government's case when the defendants had in fact trespassed and cut timber on public lands.^{1/}

ACTION BASED ON RESURVEYS TO WHICH
TRESPASSING DEFENDANTS ARE NOT BOUND
CAN BE DISMISSED WITHOUT PREJUDICE

The district court found that the defendants had in fact trespassed. "The evidence establishes that such trespasses occurred, but since the plaintiff tried the case on the basis of the alleged dependent re-surveys there was no way that the Court could fix the extent of such trespasses" (Fdg. 3, R. 13). The court found that the United States had

^{1/} On appeal for the first time the defendants are objecting to the nature of the disposition of the case. At trial, the court announced that it was going to dismiss the case without prejudice (Tr. 175). The defendants were silent. They did not even file a motion for amendment of the judgment. The district court was never apprised of the defendants' position so that it might correct its ruling if in error. This failure to make timely objection should, in itself, preclude defendants from raising the matter on appeal.

a claim on which relief could be granted, but had wrongly relied upon the resurveys instead of the original survey. The defendants, the court said as a matter of law, are not bound by the resurveys because they were performed subsequent to the trespasses (Fdg. 3, R. 13; Supp. Concl., R. 30). Therefore, the court concluded, the Government's case should be dismissed without prejudice, subject to the Government's right to bring a suit based upon the original survey (Concl. of Law, R. 13). No abuse of discretion occurred and good cause existed for such disposition. An error of proof which can be remedied should not be fatal to the plaintiff and release the wrongdoer from any liability.

Furthermore, a dismissal with prejudice would have created an impossible situation. Such a disposition would have gone to the merits of the case. As between the United States and the defendants, its effect would have been to put title in the defendants. However, the defendants never proved their boundaries and never proved their title to the lands in dispute (G. Br. 20-22, 26). They even stated that it would

be impossible to accurately reestablish the boundaries (H. Br. 32; supra p. 11). And the court seems to have assumed that suit would lie for any trespasses occurring after the resurvey. Thus dismissal without prejudice was the bare minimum to which the United States was entitled.

CONCLUSION

For the foregoing reasons, the defendants should not prevail in their appeal from the district court's "dismissal without prejudice."

Respectfully submitted,

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CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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